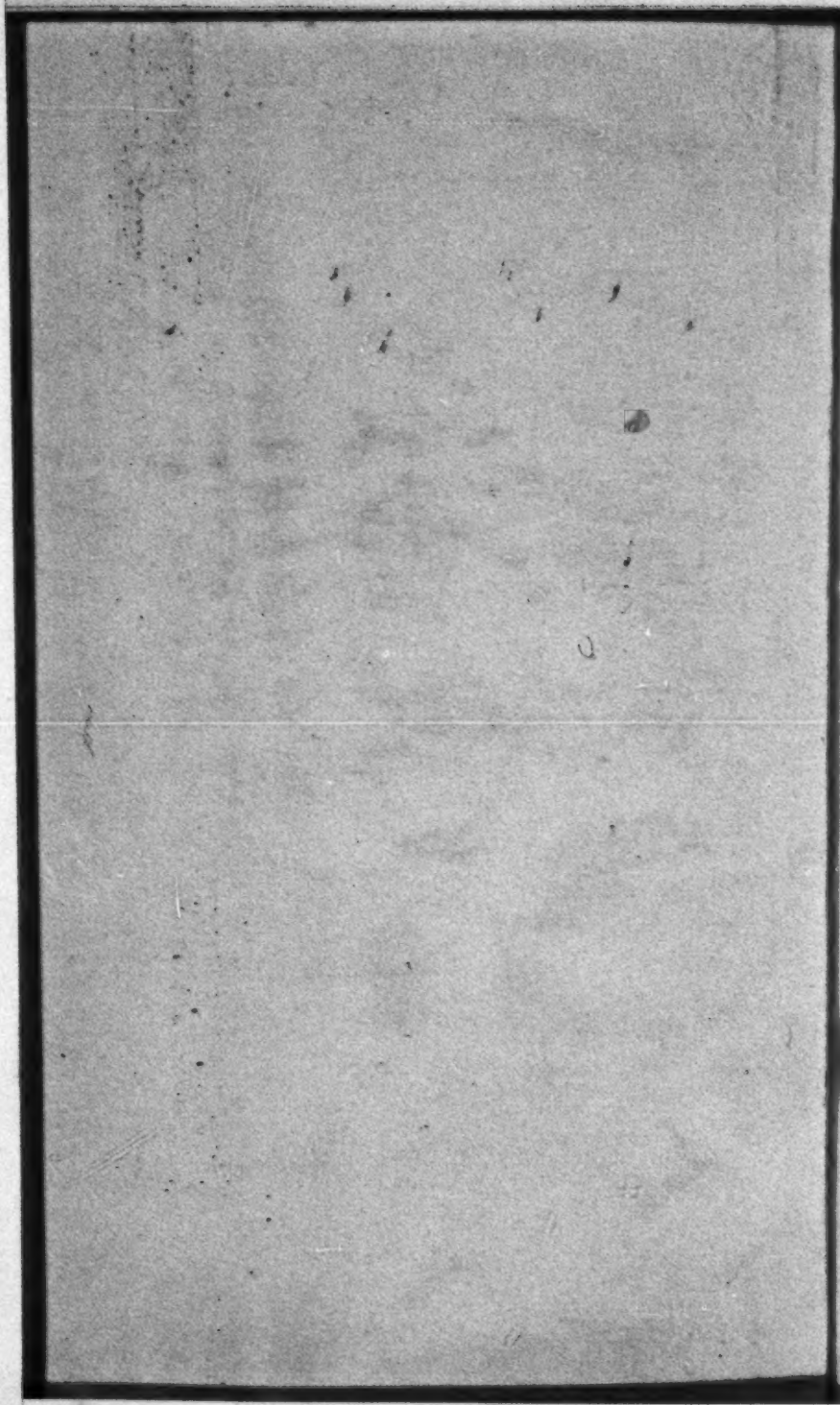

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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-888

H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAZER and MARION L. LEAZER, individually, on behalf of themselves and on behalf of all similarly situated Plaintiffs,

Petitioners,

v.

INTERNATIONAL PAPER COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LANGROCK AND SPERRY,
PETER F. LANGROCK, ESQ.,
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Counsel for Petitioners.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1972

No. .....

H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAZER and MARION L. LEAZER, individually, on behalf of themselves and on behalf of all similarly situated Plaintiffs,

Petitioners,

v.

INTERNATIONAL PAPER COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on September 7, 1972. Motion for Rehearing denied October 18, 1972.

Reference to Opinions of Courts Below

The Opinion of the United States Court of Appeals for the Second Circuit, Docket No. 71-2157, dated September 7, 1972, is not officially reported. It is attached hereto as Appendix A.

The Opinion of the United States Court of Appeals for the Second Circuit, Docket No. 71-2157, dated October 18, 1972, is not officially reported and is attached hereto as Appendix B.

The Opinion and Order of the United States District Court for the District of Vermont, Docket No. 71-2157, dated September 30, 1971, and that Court's Amendment to its Order dated October 21, 1971, are attached hereto as Appendix C.

The Opinion of the United States District Court for the District of Vermont is reported at 53 F. R. D. 430.

Grounds for Jurisdiction

Petitioners seek review of the Judgment of the United States Court of Appeals for the Second Circuit dated September 7, 1972, Docket No. 742; that Court, by a 2 to 1 vote affirmed the Order of the United States District Court for the District of Vermont, dated September 30, 1971, both Courts holding that the United States District Court for the District of Vermont did not have jurisdiction over the Plaintiff class.

On October 18, 1972, the United States Court of Appeals for the Second Circuit, with a 4 to 3 vote *in favor*, denied Plaintiff Petitioners' Petition for a Rehearing containing a suggestion that the appeal be reheard en banc.

The statutory provision believed to confer on this Court jurisdiction to review the Judgment of the United States Court of Appeals for the Second Circuit by Writ of Certiorari is 28 U. S. C. 1254 (1).

Question Presented for Review

The question presented for review in this matter is whether a diversity action brought under 28 U. S. C. A. 1332 (a) will be allowed to proceed as a class action under Fed. R. Civ. P. 23 (b) (3) when the named Plaintiffs meet the jurisdictional amount requirement of 28 U. S. C. A. 1332 (a) but other unnamed Plaintiffs of the class do not.

Statutes and Rules Involved

The statutes and rules involved in this matter are as follows:

28 U. S. C. A. 1332 Diversity of citizenship; amount in controversy; costs

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or citizens or subjects thereof; and

(3) citizens of different States and in which . . ."

Fed. R. Civ. P. 23 (a) and (b) (3):

"Rule 23.

CLASS ACTIONS

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so

numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * *

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

Statement as to Whether any Federal Court has Certified to the United States Attorney General Pursuant to 28 U. S. C. A. 2403 as Required by Supreme Court Rule 33

This action does not involve a proceeding in a court of the United States wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question and therefore none of the courts in this matter have certified to the Attorney General pursuant to 28 U. S. C. A. 2403 the fact that the constitutionality of any Act of Congress has been drawn in questions.

Statement of the Case

This Writ is sought to review the September 7, 1972 affirmation by the United States Court of Appeals for the Second Circuit of a Decision of the United States District Court of the District of Vermont, dated September 30, 1971, wherein the District Court denied permission for this case to proceed as a class action under Fed. R. Civ. P. 23 (b) (3).

This is a diversity action seeking compensation and punitive damages for harm to the Plaintiff's lakefront properties caused by the Defendant International Paper Company's alleged pollution of Lake Champlain. The action was filed in the United States District Court for the District of Vermont on February 9, 1971 by the named Plaintiffs on behalf of themselves individually and on behalf of all other Plaintiffs similarly situated. The basis for jurisdiction in the first instance was 28 U. S. C. A. 1332 (a). The District Court dismissed this case for lack of jurisdiction as to all members of the class except the named Plaintiffs, and then permitted an interlocutory appeal under 28 U. S. C. A. 1292 (b).

The Complaint alleged that discharges into Ticonderoga Bay in southern Lake Champlain from Defendant's pulp and paper manufacturing plant in Ticonderoga, New York, had caused the formation of a "sludge blanket or bed" of woodchips, cinders, and other decaying organic waste material, had adversely affected the water quality of the lake, and had resulted in deposits of portions of the sludge on Vermont lakefront properties across from the plant. The named Plaintiffs sued on behalf of a class of some 200 lakefront landowners and lessees in a three-town geographic area, claiming that the value of their properties has been diminished as a result of discharges from the plant, and

seeking compensatory and punitive damages. The Complaint alleges that the named Plaintiffs have each suffered damages in excess of $10,000.00, but makes no allegations as to the damages of the unnamed members of the purported class.

This is essentially the same set of facts which produced a suit of which this Court took original jurisdiction during the October Term, 1970, *State of Vermont* v. *State of New York and International Paper Company*. That case is presently being tried before a master.

The District Court held "with great reluctance" (37) that this suit could not be maintained as a class action under Fed. R. Civ. P. 23(b) (3), reading *Snyder* v. *Harris*, 394 U. S. 332 (1969), to require that:

> "each class member in a spurious class action must independently satisfy the requirement as to jurisdictional amount." (44)

Judge Leddy found that in this case:

> "it is unlikely that the property of every lakefront landowner in the towns of Orwell, Shoreham, and Bridport is valued at $10,000.00, and, to a legal certainty, it is not credible that every such owner has suffered pollution damage in excess of $10,000." (42)

He observed that:

> "the requirement that each class member meet the jurisdictional amount clearly undermines the usefulness of Rule 23 (b) (3) class suits, because the problem of defining an appropriate class over which the court has jurisdiction will often prove insuperable." (46)

Nevertheless, Judge Leddy felt compelled to order that the action not be permitted to proceed as a class action.

The United States Court of Appeals for the Second Circuit, by a 2 to 1 vote, affirmed on September 7, 1972. In dissent, Judge Timbers argued that ancillary jurisdiction should operate to allow class treatment of this suit. He wrote:

> "The majority's reliance on *Snyder* v. *Harris* . . . strikes me as being unsupportable. In *Snyder* no member of the class had a claim that could satisfy the amount in controversy requirement; so that the Court never reached the ancillary jurisdiction issue." (27)

Unlike *Snyder*, Judge Timbers argued, this case is properly within federal jurisdiction with regard to the named Plaintiffs, and ancillary jurisdiction should extend to the unnamed Plaintiffs.

The majority opinion did not directly treat the question whether ancillary jurisdiction exists as to the unnamed Plaintiffs in this case. Accordingly, on September 18, 1972, Plaintiffs filed a petition for a rehearing containing a suggestion that the appeal be reheard en banc. Of the eight active Second Circuit judges, one disqualified himself. Of the seven remaining judges, four voted in favor of en banc reconsideration, and three opposed reconsideration. The petition was nevertheless denied, because Fed. R. App. P. 35(a) authorizes a rehearing en banc only when ordered by a "majority of the circuit judges who are in regular active service", apparently requiring a 5-2 vote in order for this appeal to be reconsidered. Judge Timbers, joined by Judge Oakes, dissented from this application of the rule.

Reasons Relied on for the Allowance of the Writ

The Supreme Court should grant this writ because the United States Court of Appeals for the Second Circuit has decided an important question of federal law which has not been, but should be, decided by this Court.

In deciding that the unnamed plaintiffs in a Rule 23 (b) (3) class action must meet the jurisdictional amount requirement, the Court of Appeals has rendered the class action device unavailable to the small claimant. While this result might be applauded if the effect were to prevent small, individual claims from clogging the federal courts, the effect here is to prevent the adjudication of suits in which the damages, though large and though resulting from a single cause, are widely dispersed. This result is contrary to the intent of the rule makers. As Judge Timbers observed in his dissent: "The purpose of the Rule 23 (b) (3) class action was to provide an efficient and economically effective procedure for adjudicating small, closely related claims." (25) The importance of the question decided by the Court of Appeals for the Second Circuit is apparent. That Court's decision completely undermines the usefulness of Rule 23 (b) (3) class suits in any action, federal question or diversity, where there is a jurisdictional amount requirement.

This Court has not decided that unnamed Rule 23 (b) (3) claimants must meet the jurisdictional amount requirement where the named members of the suit do meet the requirement. In *Snyder* v. *Harris*, 394 U. S. 332 (1969) none of the named claimants, and no member of the alleged class satisfied the jurisdictional amount requirement. The Court in that case held that the jurisdictional amount could not be reached by merely aggregating claims, but the Court in that case did not reach the

issue presented here. In fact, the Court in that case, specifically declined to rule on the issue presented here when it said:

> "It is urged, however, that this Court should now overrule its established statutory interpretation and hold that 'matter in controversy' encompasses the aggregation of all claims that can be brought together in a single suit, *regardless of whether any single plaintiff has a claim that exceeds the required amount.* (emphasis added)"
>
> *Snyder* v. *Harris*, 394 U. S. 338.

Nevertheless, language exists in *Snyder* which persuaded the courts below that the law requires that all plaintiffs satisfy the requirement. The language was insufficient, however, to convince a majority of the active judges in the Second Circuit that such is the case. Judge Timbers vigorously dissented from the majority opinion's reading of *Snyder*. Four judges voted to rehear the appeal en banc on the issue whether ancillary jurisdiction exists as to the unnamed plaintiffs here. The law is far from settled on this important question.

The Supreme Court should grant this writ in order to prevent wasteful relitigation of this issue. The importance of the Rule 23 (b) (3) class action will encourage actions by litigants whose interest is the ultimate production of a workable class action device on the Rule 23 (b) (3) model. If this writ is denied, such litigants will relitigate the issue presented here in the hope that *they* will be granted certiorari. Those members of the legal profession interested in the class action device cannot know where to direct their efforts at reform until this Court has decided whether ancillary jurisdiction extends to such unnamed plaintiffs as this case presents.

The present posture of the decision in this case, if left to stand as it is, will encourage relitigation as well. The majority appellate decision did not treat the ancillary jurisdiction question, thus leaving intact the jurisdictional theory that relitigants must naturally rely on. Judge Timbers' dissent and the fact that four Second Circuit judges voted to rehear the appeal en banc will encourage potential litigants in the belief that, given the proper panel, they will be able to gain class status under similar circumstances despite the Second Circuit majority decision. Such wasteful relitigation can be avoided by the Court's granting this writ.

The courts below are already split on the underlying question, generally presented in a joinder context, whether ancillary jurisdiction exists as to plaintiffs not meeting the jurisdictional amount requirement where one or more plaintiffs do satisfy the requirement. For cases indicating that the Court has discretion to hear the insufficient claim, see *Hatridge* v. *Aetna Cas. & Surety Co.*, C. A. 8th, 1969, 415 F. 2d 809; *Stone* v. *Stone*, C. A. 4th, 1968, 405 F. 2d 94, 96-99; *Jacobson* v. *Atlantic City Hospital*, C. A. 3d, 1968, 392 F. 2d 149, noted 1968, 30 U. Pitts. L. Rev. 413; *Wilson* v. *American Chain & Cable Co.*, C. A. 3d, 1966, 364 F. 2d 558, noted 1967, 16 Cath. U. L. Rev. 336, 66 Mich. L. Rev. 373; *General Research, Inc.* v. *American Employers' Ins. Co.*, D. C. Mich. 1968, 289 F. Supp. 735; *Lucas* v. *Seagrave Corp.*, D. C. Minn. 1967, 277 F. Supp. 338; *Wiggs* v. *City of Tullahoma*, D. C. Tenn. 1966, 261 F. Supp. 821; *Johns-Manville Sales Corp.* v. *Chicago Title & Trust Co.*, D. C. Ill. 1966, 261 F. Supp. 905, noted 1967, 81 Harv. L. Rev. 480; and cases cited 1 Barron & Holtzoff (Wright ed.) Section 24 n. 56.3. For cases indicating the contrary, see *Clark* v. *Paul Gray, Inc.*, 1939, 59 S. Ct. 744, 306 U. S. 583, 83 L. Ed. 1001; *Hymer* v. *Chai*, C. A. 9th, 1969, 407

F. 2d 136, *Aetna Ins. Co.* v. *Chicago, R. I. & P. R. Co.*, C. A. 10th, 1956, 229 F. 2d 584, noted 1957, 10 Okl. L. Rev. 92; *Jewell v. Grain Dealers Mut. Ins. Co.*, C. A. 5th, 1961, 290 F. 2d 11, criticised 1961, 64 W. Va. L. Rev. 87; *Hackner* v. *Guaranty Trust Co. of New york.*, C. C. A. 2d 1941, 117 F. 2d 95, certiorari denied 61 S. Ct. 835, 313 U. S. 559, 85 L. Ed. 1520; *Rompe* v. *Yablon*, D. C. N. Y. 1967, 277 F. Supp. 662; *Diepen* v. *Fernow*, D. C. Mich. 1940, 1 F. R. D. 378; and cases cited 1 Barron & Holtzoff (Wright ed.) section 24 n. 56.3. By granting this writ, the Court would be taking a step forward bringing order to this important area of procedure.

It is unrealistic to expect Congress to consider the issues presented here until this Court has considered them. An underlying issue here is whether there is a conflict between the statutory jurisdictional amount requirement and the intent of the makers of Rule 23 (b) (3). While theoretically Congress could act at any time to authorize ancillary jurisdiction in Rule 23 (b) (3) situations, Congress is unlikely as a practical matter to consider the desirability of such action until this Court has decided, in effect, whether Congressional action is necessary if Rule 23 (b) (3) is to be available in this situation. If this writ is denied, the possibility will persist that this Court will eventually decide that ancillary jurisdiction will allow the maintenance of a Rule 23 (b) (3) action such as this one, consistently with the jurisdictional amount requirement. Given that possibility, it is unrealistic to expect Congress to consider the question until this Court acts. It would appear, therefore, that the responsibility for resolving the confusion in this area belongs to this Court.

Judge Timbers, in dissenting from the denial of en banc reconsideration of this appeal, observed:

> "The record in this case strikes me as a particularly good one on which to resolve this important issue. The facts are not in dispute. The legal question is starkly presented. The issue to be resolved is both important and sure to recur." (38)

This argument applies equally to the question whether this Court should grant this writ. Because the record here presents the legal question clearly, in absence of factual dispute, this case provides the Court with an excellent opportunity to resolve an issue which is "both important and sure to recur."

Conclusion

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LANGROCK & SPERRY,

By: Peter F. Langrock, Esq.,
A Member of the Firm,
Drawer 351,
Middlebury, Vermont 05753.

Notice of Appearance

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. _____

H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAZER and MARION L. LEAZER, individually, on behalf of themselves and on behalf of all similarly situated Plaintiffs,

Petitioners,

v.

INTERNATIONAL PAPER COMPANY,

Respondent.

Now Comes, Peter F. Langrock, Esq. of the law firm of Langrock and Sperry, and appears for the Plaintiffs, H. Keith Zahn, Valerie Zahn, Charles Leazer and Marion L. Leazer, in the above captioned matter.

Dated at Middlebury, County of Addison and State of Vermont, this ..... day of November, 1972.

LANGROCK AND SPERRY,

By: PETER F. LANGROCK, ESQ.,
Drawer 351,
Middlebury, Vermont 05753.

Certificate of Service

I, Peter F. Langrock, Esq., a member of the firm of Langrock and Sperry, Drawer 351, Middlebury, Vermont 05753, attorney for the Plaintiffs in the above entitled cause and the Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of ....., 1972, I served copies of the foregoing Petition for a Writ of Certiorari and all appendices attached thereto and my Notice of Appearance on the International Paper Company, by mailing three copies thereof, in a duly addressed envelope with first class postage pre-paid, to the attorneys of record for said Defendant, Taggert Whipple, Esq., a member of the firm of Davis, Polk & Wardwell, 1 Chase Manhattan Plaza, New York, New York 10005; and Henry F. Black, Esq., a member of the firm of Black & Plante, Municipal Building, White River Junction, Vermont 05001.

PETER F. LANGROCK, ESQ.,
LANGROCK & SPERRY,
Drawer 351,
Middlebury, Vermont 05753.

APPENDIX A

Decision of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 742—September Term, 1971.

(Argued June 28, 1972 Decided September 7, 1972.)

Docket No. 71-2157

H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAZER, and MARION L. LEAZER, individually, on behalf of themselves and on behalf of all similarly situated Plaintiffs,

Plaintiffs-Appellants,

v.

INTERNATIONAL PAPER COMPANY,

Defendant-Appellee.

Before: Moore, Smith and Timbers,

Circuit Judges.

Interlocutory appeal under 28 U. S. C. § 1292(b) from order of the United States District Court for the District of Vermont, Bernard J. Leddy, Chief Judge, ordering that action not proceed as class action.

Affirmed.

Mark L. Sperry, Middlebury, Vt. (Langrock & Sperry, Middlebury, Vt.), for Plaintiffs-Appellants.

Taggart Whipple, New York, N. Y. (Davis, Polk & Wardwell, New York, N. Y., Richard E. Nolan, William H. Levit, Jr. and Ronald V. Bryant, of counsel)

and

Black & Plante, White River Junction, Vt. (Henry F. Black and George W. Ray, Jr., White River Junction, Vt.), of counsel, for Defendant-Appellee.

SMITH, *Circuit Judge:*

We are confronted with the novel question whether a diversity case will be allowed to proceed as a class action under Fed. R. Civ. P. 23(b)(3) when the named plaintiffs meet the jurisdictional amount requirement of 28 U. S. C. § 1332(a) but the unnamed representatives of the class do not.[1] That question was answered in the negative by

[1] The district court found that the named plaintiffs had each made good faith claims of damage in excess of $10,000, but that it was to a legal certainty incredible that each of the other lakefront landowners had suffered pollution damage in that amount. Appellants would cure this defect by allotting to the unnamed plaintiffs their share of the claimed punitive damages ($10,000,000); therefore, they argue, no final determination of class status can be made until after damages have been awarded. But the trial court is plainly not compelled to accept a claim of punitive damages, however unwarranted, made for the purpose of conferring federal jurisdiction. *See Schroeder v. Nationwide Mutual Insurance Co.*, 242 F. Supp. 787, 789 (S. D. N. Y. 1965). Indeed, in computing jurisdictional amount, a claim for punitive damages is to be given closer scrutiny, and the trial judge accorded greater discretion, than a claim for actual damages. *See Brown v. Bank of America Trust & Savings Ass'n.*, 281 F. Supp. 82, 84 (N.D. Ill. 1968). Since punitive damages are considered together with actual damages in determining the amount in controversy, the

(Footnote continued on following page)

the late Chief Judge Leddy in the United States District Court for the District of Vermont (53 F. R. D. 429). He refused to allow the case to proceed as a class action and struck all references in the complaint to persons other than the four named plaintiffs. On October 21, 1971, Judge Leddy certified the order for interlocutory appeal under 28 U. S. C. § 1292(b), and this court granted permission to appeal.

The complaint, brought by the four named owners of lakefront property on Lake Champlain on behalf of themselves and some 200 other similarly situated riparian landowners and lessees, sought compensatory and punitive damages in the total of $40,000,000 for damage to their property rights caused by appellee's alleged pollution of the lake's waters. Purportedly the discharge of untreated or inadequately treated waste from appellee's now-closed pulp and paper making plant in the Village of Ticonderoga, passing into the lake via Ticonderoga Creek, created a massive sludge blanket on the bottom of the lake; masses of sludge apparently break off periodically to wash up on appellants' property. As a consequence appellants' property is claimed to be unfit for any recreational or other reasonable use and to be permanently diminished in value.

(Footnote continued from preceding page)
district court necessarily rejected appellants' claim for punitive damages as exorbitant when it found to a legal certainty that the jurisdictional amount could not be met. Given a mass tort situation in which the conduct complained of has been altered to conform to changing societal attitudes, and in which multiple punitive awards would in any case be of doubtful utility, *see Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 840-841 (2d Cir. 1967), we are not persuaded that the district court has abused its discretion.

With "great reluctance" the district court read *Snyder* v. *Harris*, 394 U. S. 332 (1969) to compel the holding that "each class member in a spurious class action must independently satisfy the requirement as to jurisdictional amount." We agree and affirm the order below.

This case, brought under Rule 23(b)(3), would have been characterized as a "spurious" class action prior to the 1966 amendment of Rule 23. Since the new Rule 23 was intended to substitute a functional, pragmatic approach for the confusing conceptualism of the old rule,[2] the question arose whether the old restrictions which had precluded the aggregation of separate claims to compute the amount in controversy in a spurious class action were discarded. In *Snyder*, the Court stated flatly that the old categories and doctrines still apply to the determination of jurisdictional amount: in class actions which would formerly have been classified as spurious, separate and distinct claims may not be aggregated. It is true that in *Snyder* no single plaintiff met the jurisdictional amount; as the Court stated the issue, it declined to "hold that 'matter in controversy' encompasses the aggregation of all claims that can be brought together in a single suit, regardless of whether *any single plaintiff* has a claim that exceeds the jurisdictional amount." *Snyder*, 394 U. S. at 338 (emphasis supplied). *Snyder* therefore does not squarely hold that every unnamed member of a proposed spurious class must individually satisfy the jurisdictional amount. But appellants' attempt to escape the ambit of *Snyder* by this route is met

[2] *See* C. Wright, Handbook of the Law of Federal Courts § 72, at 307 (2d ed. 1970).

by persuasive internal evidence that the Court did not so limit the rule enunciated there.[3]

The Court stated the jurisdictional rule for the former spurious class action, unaltered by the amended Rule 23, to have been that "*each* plaintiff had to show that his individual claim exceeded the jurisdictional amount." *Id.* at 335 (emphasis supplied). The Court stressed that the aggregation doctrine, grounded in the statutory phrase "matter in controversy," far antedated Rule 23, and adopted by illustration the language of an early joinder case, *Troy Bank* v. *G. A. Whitehead & Co.*:

> When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of *each* be of the requisite jurisdictional amount. . . . 222 U. S. 39, 40. [*Id.* at 336 (emphasis supplied)]

And the analogy to joinder cases remains valid:

> The fact that judgments under class actions formerly classified as spurious may now have the same effect as claims brought under the joinder provisions is certainly no reason to treat them *differently* from joined actions for purposes of aggregation.
> [*Id.* at 337 (emphasis in original)]

After 1938, *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583 (1939), the rule evolved in joinder cases that distinct claims could not be aggregated was applied to class actions under the new Federal Rules. Even aside from the clear language quoted above, the Court's reliance on *Clark* appears to

[3] Indeed the dissent plainly read the rule laid down in the majority opinion to deny appellants this escape. *Snyder*, 394 U.S. at 343.

offer an insurmountable obstacle to appellants, for the *Clark* Court had recognized that one originally named member of the proposed class might meet the jurisdictional amount requirement, just as the named plaintiffs do here; yet the action was dismissed as to all plaintiffs except that one. *Clark*, 306 U. S. at 589-5900. It is no basis to distinguish *Clark* that *all*, rather than only one, of the named plaintiffs here meet the jurisdictional amount requirement; the point is that in a spurious class action one plaintiff may not ride in on another's coattails. Similarly the Court of Appeals for the Fifth Circuit, whose position was upheld by *Snyder*, dismissed a purported class action where only one member of the proposed class, albeit not a named member, could make a showing of the requisite jurisdictional amount, citing *Clark* v. *Paul Gray, Inc., supra*. *Alvarez* v. *Pan American Life Insurance Co.*, 375 F.2d 992, 996-997 (5th Cir.), *cert. denied*, 389 U. S. 827 (1967).

We are entirely sympathetic to the proposition that the amended Rule 23 "should be given a liberal rather than a restrictive interpretation" in order to vindicate small federal claims. *Eisen* v. *Carlisle & Jacquelin*, 391 F. 2d 555, 563 (2d Cir. 1968); but the policies underlying the amended rule are not determinative of this case.[4] Rather it is clear in the light of *Snyder*, 394 U. S. at 336, that the critical focus in resolving the issue before us must be on 28 U. S. C. § 1332. Accepting that, one might ask how application of the aggregation doctrine to preclude this class action will

[4] It is clear both from the majority opinion, 394 U.S. at 338, 341 and from the dissent of Justice Fortas, joined by Justice Douglas, *id.* at 342, that the Court in *Snyder* confronted and rejected the same policy arguments based on the amended Rule 23 which are presently made to this court.

sustain the congressional purpose underlying the jurisdictional amount requirement of section 1332 stressed in *Snyder:* to check the rising caseloads in federal courts. After all, this action may still be maintained in federal court under the banner of the named plaintiffs; but that was equally true in *Clark* and *Alvarez*. However, were this case to proceed as a class action it would in fact significantly increase the burden on the federal courts. Once appellee's liability had been established, and even assuming that appellee's defenses would not vary as to different members of appellants' class, it would be an enormously time consuming task to assess the damages suffered by each of the 200 riparian landowners, each of whose claims is regarded as separate and distinct. Indeed the Advisory Committee did not intend that Rule 23(b)(3) ordinarily be utilized in a mass tort situation. Advisory Committee Note, 39 F. R. D. 98, 103 (1966). Moreover a second policy consideration relied on in *Snyder* is relevant here: local controversies involving claims to be settled on the basis of state law "can often be most appropriately tried in state courts." *Snyder*, 394 U. S. at 341.

We are therefore persuaded that the district court properly applied the non-aggregation doctrine in refusing jurisdiction over the plaintiff class proposed in this case.

Affirmed.

Decision of the United States Court of Appeals for the Second Circuit

TIMBERS, *Circuit Judge* (dissenting):

With deference, it seems to me that the majority reads the Supreme Court's decision in *Snyder* v. *Harris*, 394 U. S. 332 (1969), for all it might be worth, rather than for the least it has to be worth. More significantly, the majority decision here ignores the well-established principle that if a case is properly in a federal court, that court has subject matter jurisdiction over the case or controversy in its entirety and therefore can adjudicate related claims of ancillary parties who have no independent jurisdictional grounds.

I.

The concept of "ancillary jurisdiction" has been a part of the jurisprudence of the federal courts for many years. It originally was used to allow parties otherwise without grounds for jurisdiction to assert rights in property that had come under a federal court's control. *Freeman* v. *Howe*, 65 U. S. (24 How.) 450 (1861). Similarly, the doctrine was utilized to enable federal courts to effectuate their judgments in suits that had properly been before them. *Supreme Tribe of Ben-Hur.* v. *Cauble*, 255 U. S. 356 (1921). During this early period, the concept of ancillary jurisdiction was applied only to situations in which its use was necessary to the effective operation of the federal courts.

Since the Supreme Court's decision in *Moore* v. *New York Cotton Exchange*, 270 U. S. 593 (1926), however, the concept has been used primarily to promote judicial economy through the avoidance of piecemeal litigation. In *Moore*, a state claim not independently cognizable in a

federal court was asserted by way of compulsory counterclaim to a federal claim. The Court held that the state claim could be heard in the federal court even though the federal claim was eventually dismissed on the merits. The *Moore* decision was one of the major inspirations for the development of a general principle that federal courts can invoke ancillary jurisdiction to resolve in a single action any disputes, regardless of jurisdictional sufficiency, arising out of the facts supporting the plaintiff's "cause of action". See, e.g. *Hurn* v. *Oursler*, 289 U. S. 238 (1933).

The enactment of the Federal Rules of Civil Procedure, with their provisions for liberal joinder of parties and claims, especially stimulated the growth of the ancillary jurisdiction doctrine. The Rules broadened the concept of a single triable case or controversy by allowing to be joined in one action all parties and claims related to the main action. Also, courts found the ancillary jurisdiction doctrine helpful in putting to use some of the new joinder devices, particularly Rules 14, 20 and 24. Lower federal courts including ours, were quick to recognize that ancillary jurisdiction was available to solve jurisdictional problems, such as lack of diversity or amount in controversy, which were often attendant upon utilization of joinder procedures. See, e.g. *Dery* v. *Wyer*, 265 F. 2d 804 (2 Cir. 1959) (impleader of third party defendant); *Formulabs, Inc.* v. *Hartley Pen Co.*, 318 F. 2d 485 (9 Cir. 1963) (intervention as of right); *Jacobson* v. *Atlantic City Hosp.*, 392 F. 2d 149 (3 Cir. 1968) (simple joinder of parties). But see *Hymes* v. *Chai*, 407 F. 2d 136 (9 Cir. 1969 (simple joinder of

parties).[1] These developments impelled one commentator to say recently that the ancillary jurisdiction doctrine "is in a process of evolution from a rule of prevention of basic unfairness to a rule of convenience for resolving all issues involved in the subject of the matter before the court". Note, Federal Practice: Jurisdiction of Third-Party Claims, 11 Okla. L. Rev. 326, 329 (1958), quoted in 7A Wright & Miller, Federal Practice and Procedure § 1917, at 590 n. 29 (1969. The majority's decision today greatly retards this "process of evolution".

An extension of the ancillary jurisdiction doctrine to permit an adjudication of the claims of the unnamed plaintiffs in this action would be unquestionably harmonious with this development.[2] For example, although in the past the courts had held that they could not invoke ancillary jurisdiction to hear claims for less than $10,000 asserted by parties joined under Rule 20, the majority of recent decisions are to the contrary. See, e.g., *General Research,*

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[1] In addition to a split of authority on the use of ancillary jurisdiction with regard to joinder under Rule 20, the courts have also held that the doctrine may not be used to provide jurisdiction over a party determined to be indispensable under Rule 19, e.g. *Lang* v. *Colonial Pipeline Co.*, 383 F.2d 986 (3 Cir. 1967), or a party seeking permissive intervention under Rule 24(b), e.g. *Hunt Tool Co.* v. *Moore, Inc.*, 212 F.2d 685 (5 Cir. 1954).

[2] Such a result would be consistent with the firmly established rule that claims against third party defendants properly impleaded under Rule 14 need not satisfy the amount in controversy requirement, *King* v. *State Farm Mut. Ins. Co.*, 274 F.Supp. 824 (W.D. Ark. 1967); *Schinella* v. *Iron Workers Union Local 361*, 149 F.Supp. 5 (E.D.N.Y. 1957), and the rule that once federal jurisdiction has been fixed by the original parties of record in a class action, subsequent intervenors need not meet the jurisdictional requirements as to diversity and amount, *Dickinson* v. *Burnham*, 197 F.2d 973 (2 Cir. 1952).

Inc. v. *American Employers' Ins. Co.*, 289 F. Supp. 735 (W. D. Mich. 1968); *Lucas* v. *Seagrave Corp.*, 277 F. Supp. 338 (D. Minn. 1967); *John Manville Sales Corp.* v. *Chicago Title & Trust Co.*, 261 F. Supp. 905 (N. D. Ill. 1966). This change in position reflects growing realization that the disposition of jurisdictionally insufficient claims along with reasonably related claims having an independent jurisdictional basis is expeditious and not unduly burdensome. There is, of course, a limit on the number and nature of claims that can be conveniently tried together, but that limit would not be exceeded by adjudicating all the class members' claims here. Indeed, the purpose of the Rule 23(b)(3) class action device was to provide an efficient and economically effective procedure for adjudicating numerous small, closely related claims. See *Eisen* v. *Carlisle and Jacquelin*, 391 F. 2d 555 (2 Cir. 1968); *Escott* v. *Barchris Construction Corp.*, 340 F. 2d 731 (2 Cir. 1965).

II.

The Supreme Court has not yet dealt with an ancillary jurisdiction doctrine in the context of a decision involving the Federal Rules of Civil Procedure. But in *United Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966), the Court commented on the impact of the Rules while approving the liberal use of "pendent jurisdiction", a particularized application of the ancillary jurisdiction concept. In *Gibbs*, the plaintiff asserted a claim under § 303 of the Labor Management Relations Act and a state claim of unlawful conspiracy and boycott. The Court held that by means of pendent jurisdiction the federal court had adjudicative power over the state claim. Writing the opinion for the Court, Justice Brennan said:

"... Under the [Federal Civil] Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged. Yet because the *Hurn* question involves issues of jurisdiction as well as convenience, there has been some tendency to limit its application to cases in which the state and federal claims are, as in *Hurn*, 'little more than the equivalent of different epithets to characterize the same group of circumstances.' 289 U.S., at 246.

This limited approach is unnecessarily grudging. Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .' U.S., Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. *Levering & Garrigues Co.* v. *Morrin*, 289 U.S. 103. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole." 383 U.S. at 724-25.

These principles as expressed by the *Gibbs* court apply equally to a situation where the claims of named plaintiffs in a class action are properly before the court but the similar claims of other members of the class lack subject matter jurisdiction: judicial authority over the ancillary claims exist if the relationship between the claims having independent jurisdictional grounds and the pendent claims "permits the conclusion that the entire action before the

court comprises but one constitutional 'case'"; or, as applied to the jurisdictional deficiency in the instant case, "if, considered without regard to" the amount in controversy, the claims satisfying the jurisdictional amount requirement and those that do not "are such that [the parties] would ordinarily be expected to try them all in one judicial proceeding, . . . there is *power* in federal courts to hear the whole". 383 U.S. at 724-25. Indeed, since pendent jurisdiction concerns constitutional limitations on the jurisdiction of federal courts, while the instant suit involves only statutory limitations, the case for recognizing jurisdiction over all class members and their claims here is even stronger. See *Leather's Best, Inc.* v. *S.S. Mormaclynx*, 451 F.2d 800, 809-11 (2 Cir. 1971); cf. *Ryan* v. *J. Walter Thompson Co.*, 453 F.2d 444, 446 (2 Cir. 1971), *cert. denied*, ____ U. S. ____ ( ).

III.

The majority's reliance on *Snyder* v. *Harris*, 394 U.S. 332 (1969), and *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583 (1939), strikes me as being unsupportable. In *Snyder* no member of the class had a claim that could satisfy the amount in controversy requirement; so the Court never reached the ancillary jurisdiction issue. The Court held that the separate and distinct claims presented by or on behalf of the various claimants could not be aggregated to supply the $10,000 jurisdictional amount. The Court reached that result because (1) there was a settled line of precedent establishing that separate and distinct claims could not be aggregated for jurisdictional amount purposes, and (2) the workload of the federal courts would

be substantially increased if those precedents were overruled. The Court's position was summarized in the following statement:

> "There is no compelling reason for this Court to overturn a settled interpretation of an important congressional statute in order to add to the burdens of an already overloaded federal court system." 394 U.S. at 341.

The rationale of the *Snyder* decision is inapplicable to the issue before us. There is no "settled line of precedent" that every member of a Rule 23(b)(3) class must satisfy the amount in controversy requirement. The *Snyder* court referred to *Clark* v. *Paul Gray, Inc.*, as the first case to apply the nonaggregation rule to a class action situation. 394 U.S. at 336-37. In that case, as the majority here points out, at least one plaintiff had a claim in excess of $10,000, but the Supreme Court held that each plaintiff who had a similar claim must meet the amount in controversy requirement. That suit, however, seems not to have been a class action, although the *Snyder* court characterized it as such; it was merely a case of permissive joinder. It was decided prior to the 1966 amendment of Rule 23, which had the effect of making a judgment in a Rule 23(b)(3) class action binding on unnamed plaintiffs, thus greatly distinguishing it from a permissive joinder situation and old Rule 23.

Most importantly, whatever the nature of the action in *Clark*, the precedential value of that decision has been substantially reduced by recent decisions. Although the Court in *Snyder* cited *Clark* with approval, its approval

was directed not to the holding in *Clark* but to some of *Clark's* dictum on aggregation of claims. Since *Clark* was decided, moreover, the ancillary jurisdiction doctrine has expanded and grown. As discussed above, within the last few years many federal courts have held that a court has discretion to adjudicate a jurisdictionally insufficient claim joined with a claim for more than $10,000 if the claims derive primarily from the same operative facts. See *Hatridge* v. *Aetna Cas. & Sur. Co.*, 415 F.2d 809 (8 Cir. 1969); *Stone* v. *Stone*, 405 F.2d 94 (4 Cir. 1968); *Jacobson* v. *Atlantic City Hospital*, 392 F.2d 149 (3 Cir. 1968); *Wilson* v. *American Chain and Cable Co.*, 364 F.2d 558 (3 Cir. 1966); Wright, Federal Courts 124, 316 (1970). Cf. *United Mine Workers* v. *Gibbs*, *supra*. But see *Alvarez* v. *Pan American Life Ins. Co.*, 375 F.2d 992, 996-97 (5 Cir.), *cert. denied*, 389 U.S. 827 (1967), referred to by the majority.[3] In the light of this distinct trend, and the Supreme Court's enthusiastic endorsement in *Gibbs* of the ancillary jurisdiction concept, old cases such as *Clark* should be wielded with discrimination.

The other reason for the result in *Snyder*—to avoid a large increase in the workload of the federal courts—is also inapplicable to the present controversy. The four named plaintiffs here meet the jurisdictional requirements; a federal court must adjudicate their claims. The burden on the federal courts would not be substantially increased if the claims of the other class members were to be heard by the same court; the predominate questions of law or

[3] *Alvarez* held that in a class action where the claims of the members are several and distinct, each member must establish jurisdictional amount.

fact with regard to these claims must be common to all the claims or a class action could not be brought. If the trial court decides before or during trial that the resolution of individual issues will be difficult and time-consuming, it can refuse to try the ancillary claims. The *Gibbs* decision provides authority for wide discretion in a trial judge to determine whether all the claims arising out of a transaction or occurrence should be tried together in federal court:

> "That power [pendent jurisdiction] need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction. . . ." 383 U.S. at 726.

The position of the majority in this action promotes duplicative litigation—a trial of the representative claims in the federal court and an identical action by the other class members in the state court. Not only does this discourage the named plaintiffs from asserting their right to a federal forum, but it restricts the use of the Rule 23(b)(3) class action to the extraordinary situation in which every member of the class has a claim in excess of $10,000 (unless a statute dispensing with the jurisdictional amount requirement can be invoked). Furthermore, there is no guarantee that a class action could be initiated in the state court. Many states discourage class actions and if the individual claims are so small that suit would have to be instituted in a state court of limited jurisdiction, most likely the class action device would be unavailable.

Decision of the United States Court of Appeals for the Second Circuit

The majority's decision is not compelled by *Snyder* and *Clark*, as the opinion states. The result reached disregards the development of a second doctrine for more efficient and economical judicial administration and severely impairs the efforts of those who would modernize the federal law of class actions. It undercuts this Circuit's strong policy favoring class actions. I therefore respectfully dissent.

APPENDIX B

Decision of the United States Court of Appeals for the Second Circuit denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 71-2157.

H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAZER and MARION L. LEAZER,
Plaintiffs-Appellants,

v.

INTERNATIONAL PAPER COMPANY,
Defendant-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ LEONARD P. MOORE,
LEONARD P. MOORE,

/s/ J. JOSEPH SMITH,
J. JOSEPH SMITH,

/s/ WILLIAM H. TIMBERS,
(I dissent),
WILLIAM H. TIMBERS,
Circuit Judges.

October 18, 1972.

Decision of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 71-2157

H. KEITH ZAHN and VALERIE ZAHN,
CHARLES LEAZER and MARION L. LEAZER,
Plaintiffs-Appellants,

v.

INTERNATIONAL PAPER COMPANY,
Defendant-Appellee.

A petition for a rehearing containing a suggestion that the appeal be reheard en banc having been filed herein by counsel for the appellants, and a poll of the judges in active service having been taken on the request of such a judge, and Judges Hays, Feinberg, Oakes and Timbers having voted to grant the petition, and Judges Kaufman, Mansfield and Mulligan having voted to deny the petition, and opinions having been filed by Judges Kaufman, Mansfield, and Timbers and Chief Judge Friendly being disqualified,

It is therefore

Ordered that rehearing before the court en banc is denied for want of an affirmative vote "by a majority of the circuit judges of the circuit who are in regular active service."

/s/ IRVING R. KAUFMAN,
IRVING R. KAUFMAN,
Acting Chief Judge.

October 18, 1972

Decision of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing

KAUFMAN, *Circuit Judge* (with whom Judges Mansfield and Mulligan concur):

It is unfortunate that our brothers Timbers and Oakes have chosen this case to express their disappointment over the result of the en banc vote. Although it is true that the Rule authorizes a rehearing en banc only when ordered by a "majority of the circuit judges who are in regular active service," 28 U.S.C. § 46, the governing statute, provides that a senior judge who sat in the original hearing of the case may, in the event the case is reheard en banc, vote on the merits of the appeal. Accordingly, it would be ironic if this case were en banced, as urged by Judges Timbers and Oakes, since a minority of the judges qualified to ultimately vote on the merits would carry the day. Moreover, it is not unreasonably presumptuous to predict that Judge Smith, who authored a thoroughly considered opinion for the panel, and Judge Moore, who concurred with him, would have opposed a rehearing en banc if given that opportunity, and would have adhered to their original views on the merits, had the case been reheard en banc, notwithstanding the sparse citation in our brother Timbers's opinion. In either instance, there would have been a majority voting against those who favored a rehearing en banc.[1]

[1] As for the contention in the dissenting opinion that "The issue is whether a 3-judge *minority*—on a court for which Congress has provided a 9-judge complement, 28 U.S.C. § 44(a) (1970)—may block the reconsideration en banc which the majority wants . . .," we call to our brothers' attention that four also is not a majority of either eight or nine. Surely the example posed by Judge Mansfield where only five judges in regular active service are available to vote on whether to order a rehearing en banc illustrates the inappropriateness of a simplistic "majority of those voting" criterion for Rule 35.

Decision of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing

In view of the circumstances of this case, I fear our dissenting brothers have staked too much upon the label *senior* or *active*.

I fully concur in the views expressed in Judge Mansfield's opinion.

MANSFIELD, *Circuit Judge* (with whom Judges Kaufman and Mulligan concur):

I concur in the views expressed by Judge Kaufman.

The time may well have come for a Congressional review of Title 28 U. S. C. § 46(c) which governs en banc procedure in federal courts of appeal, because of its apparent inconsistency in declaring, on the one hand, that a senior judge who heard an appeal as a panel member may not participate in ordering it to be heard en banc but, on the other, that he may participate in an en banc reconsideration ordered by a vote of the "majority of the circuit judges of the circuit who are in active service." However, the dissent, by suggesting that the majority requirement can have an unfortunate or unfair impact in cases where less than the court's full complement of judges is available to vote misconceives the purpose of the statute and of Rule 35(a) enacted pursuant to it. In my view if the dissent's views were adopted, the objective of en banc procedure would be threatened.

The goal of § 46(c) and of Rule 35(a) is to achieve intracircuit uniformity by assuring that where questions of exceptional importance are presented the law of the circuit will be established by the vote of a majority of the full court rather than by a three-judge panel. H. R.

Rep. No. 1246, 77th Cong., 1st Sess. (1941); Hearings on S. 1053; before a Subcommittee of the Senate Committee, 77th Cong., 1st Sess. 14-16 (1941). The judges voting in favor of en banc in this case mistakenly described themselves as representing "the will of a majority of the Court". (Fn. 1). Actually they represent less than a majority. The issue here is whether four judges of a court with a nine-judge complement may force an en banc reconsideration that could result in the law of the circuit being determined by less than a majority of the court. If less than a majority could determine the law of the circuit, the purpose of en banc procedure would be eroded. Carried to its logicaly extreme it would mean that in a case where only five members of a nine-member court were available (either because of vacancies, disqualifications, illnesses or the like) the law of the circuit would be determined by the vote of only three. It was just to avoid such a possibility that Congress provided that a vote of a majority of the court's full complement should be required. The majority requirement serves the further salutary purpose of limiting en banc hearings to questions of exceptional importance rather than allow the court to drift into the unfortunate habit of requiring such hearings in every case where a minority of the court may desire a decision by the full court. At a time when the judicial work load of most courts of appeal is at an unprecedented high, sittings en banc should continue to remain the exception.

There is nothing unfair about the majority requirement, either generally or in this case. In cases of exceptional importance, or where there is a conflict between circuits, it

may be expected that the Supreme Court will grant certiorari and settle the questions in issue. For this reason this Circuit for many years did not hear appeals en banc, see *Lopinsky* v. *Hertz Drive-UR-Self Systems*, 194 F. 2d 422, 429 (2d Cir. 1951) (concurirng opinion of Judge Clark), preferring to adhere to panel decisions, at least where recent. See Schick, *Learned Hand's Court*, Johns Hopkins Press (1970) pp. 105, 115-120. As for the present case, as Judge Kaufman has observed, the ironic feature is that if the two senior judges who joined in the majority opinion were permitted a voice on the issue, it may reasonably be inferred that they would vote against hearing the appeal en banc.

TIMBERS, *Circuit Judge* (dissenting):

In this environmental suit involving alleged pollution of the waters of Lake Champlain, the late Chief Judge Leddy of the District Court for the District of Vermont reached his class action determination "with great reluctance". 53 F. R. D. 430, 433. In affirming the district court by a 2-1 vote, Judge Smith's forthright panel majority opinion acknowledged that "[w]e are confronted with the novel question whether a diversity case will be allowed to proceed as a class action under Fed. R. Civ. P. 23(b)(3) when the named plaintiffs meet the jurisdictional amount requirement of 28 U. S. C. § 1332(a) but the unnamed representatives of the class do not." ____ F. 2d at ____.

I have already expressed in my panel dissent, ____ F. 2d at ____, my views on this novel issue, the resolution of which will vitally affect the viability of the Rule 23(b)(3)

class action. The record in this case strikes me as a particularly good one on which to resolve this important issue. The facts are not in dispute. The legal question is starkly presented. The issue to be resolved is both important and sure to recur.

Finally, I think it is most unfortunate that en banc reconsideration of such a substantial question of unusual importance is being *denied* despite the 4-3 vote by the active judges of this Court *in favor* of en banc reconsideration. This comes about because there has been a vacancy on this nine judge Court for nearly a year and one of the eight active judges has abstained from voting in this case by reason of disqualification. Fed. R. App. P. 35(a) authorizes a rehearing en banc only when ordered by a "majority of the circuit judges who are in regular active service". With only eight active judges, when one judge by reason of disqualification is *excluded* from voting whether to en banc but is *included* in determining what constitutes a majority, then the rule appears to require five out of seven to en banc the case. Such a result seems to me to be most unfortunate in thwarting the clear intent of the rule. It is especially unfortunate here where the rule operates to permit a *minority* of the active judges of the Court to deny en banc reconsideration of one of the more pressing issues of our day—an issue to which the best thinking of legal scholars, lawyers and judges has been devoted.

I therefore respectfully but most emphatically dissent from the denial of reconsideration en banc.

I am authorized to state that Judge Oakes concurs in this dissenting opinion.[1]

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[1] We note that our colleagues, Judge Kaufman and Mansfield, have chosen to file opinions relating to our dissent.

We claim no omniscience as to how our colleagues, Senior Judges Moore and Smith, would vote on the merits in the event of a rehearing en banc in this case. That of course is *not* the issue to which our dissent is addressed. The issue is whether a 3-judge *minority*—on a Court for which Congress has provided a 9-judge complement, 28 U.S.C. § 44(a) (1970)—may block the reconsideration en banc which the majority wants of a substantial question of unusual importance. And as we all known, despite the guesswork of our colleagues as to how our Senior colleagues would vote if they could vote on whether to en banc, the fact is that not infrequently the author of the majority opinion of a divided panel has voted in favor of en banc reconsideration. See e.g., *Scenic Hudson II*, 453 F.2d 463, 494 (2 Cir. 1971), *cert. denied*, 407 U.S. 926 (1972), and other en banc cases. And there are times when judges change their minds on the merits of an issue. See, e.g., Waterman, J., concurring in *Local 1251, UAW* v. *Robertshaw Controls Co.*, 405 F.2d 29, 33 (2 Cir. 1968) (en banc), overruling *Zdanok* v. *Glidden Co.*, 288 F.2d 99 (2 Cir. 1961).

To the extent that Judges Kaufman and Mansfield believe that "[t]he time may well have come for a Congressional review" of that part of 28 U.S.C. § 46(c) (1970) that governs en banc procedure, we agree. Such review, in addition to considering the present anomaly by which a minority can thwart the will of a majority of the Court in determining whether en banc reconsideration is to be granted, might also appropriately address itself to the question whether, in en banc matters, all Senior judges who have elected to continue their judicial service pursuant to 28 U.S.C. § 294 (1970) should be fully enfranchised. Surely any Senior judge who sat on the original panel should be permitted to vote on whether to en banc the case (as he now is permitted to vote on the merits if the case is en banced).

APPENDIX C.

Decision of United States District Court for the District of Vermont

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAZER and MARION L. LEAZER, individually, on behalf of themselves and on behalf of all similarly situated Plaintiffs,

v.

INTERNATIONAL PAPER COMPANY.

Civil Action.

File No. 6192.

OPINION AND ORDER

Peter Langrock, Esq. and Mark Sperry, Esq., Langrock & Sperry, Middlebury, Vermont, for plaintiffs.

Henry Black, Esq., Black & Plante, White River Junction, Vermont, and Taggart Whipple, Esq., Richard Nolan, Esq., and Frank Ferony, Esq., Davis, Polk & Wardwell, New York, New York, for defendants.

LEDDY, *Chief Judge.*

This is a diversity action in which the plaintiffs seek compensatory and punitive damages for impairment of their property rights as a result of the defendant's alleged

pollution of Lake Champlain. The named plaintiffs, allegedly owners of lakefront property in Orwell, Vermont, seek to maintain this suit as a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure. Plaintiffs allege that all lakefront landowners and lessees in the towns of Orwell, Shoreham, and Bridport, Vermont, numbering more than two hundred, are properly members of the class they seek to represent.

We must initially determine whether there is jurisdiction over all the members of the proposed class. The defendants contend that some members of the class are residents of New York and that the court does not have jurisdiction over these persons. This position is clearly untenable. One of the factors relied on by the Supreme Court in reaching its conclusion in *Snyder* v. *Harris*, 394 U. S. 332 (1969) was that:

> Under current doctrine, if one member of a class is of diverse citizenship from the class opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant and have nothing to fear from trying the lawsuit in the courts of their own State. *See Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356 (1921)

394 U. S. at 340.

The defendant's contention that many members of the proposed class fail to meet the $10,000 jurisdictional amount is crucial, however. The sums in good faith claimed by the plaintiffs control the determination of jurisdictional amount unless "from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff[s] cannot recover the

amount claimed . . . ." *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 288-89 (1938). Applying this standard, we think that the named plaintiffs meet the jurisdictional amount. However, the named plaintiffs have made no allegations as to the damage sustained by each member of the proposed class. Indeed, it is unlikely that the property of every lakefront landowner in the towns of Orwell, Shoreham, and Bridport is valued at $10,000, and, to a legal certainty, it is not credible that every such owner has suffered pollution damage in excess of $10,000.

This action would have been considered a "spurious" class action under Rule 23 before its amendment in 1966, because the claims of the class members are separate and distinct. *See, e.g., Snyder* v. *Harris, supra*, 394 U. S. at 335-36. Thus the question is whether federal courts have jurisdiction over all members of an allegedly otherwise proper class, in a class suit in which the claims of the class members are separate and distinct, if some members of the class individually meet the jurisdictional requirement as to the amount in controversy and others, who are not named representatives, do not.

In *Snyder* v. *Harris, supra*, the Supreme Court held that aggregation of damages to satisfy the jurisdictional amount is not permissible in "spurious" class actions. This doctrine, the Court held, is based upon its prior interpretation of the statutory phrase "matter in controversy" in 28 U. S. C. § 1332(a) and its predecessors, rather than on Rule 23 or any other rule of procedure. The Court looked for interpretation of this phrase to *Troy Bank* v. *Whitehead & Co.*, 222 U. S. 39, 40 (1911), *Pinel* v. *Pinel*, 240 U. S. 594 (1916),

and *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583 (1939). All three of these cases state that *each* plaintiff must meet the jurisdictional amount. Both *Troy Bank* and *Pinel* were joinder cases, but *Snyder* stated that *Clark* applied this joinder doctrine to class actions (although we confess that we can find nothing in the official report of *Clark* clearly indicating that it was, in fact, a class action). Professor Wright notes that the "dissenters in Snyder thought that the rule there announced would apply 'in all cases where one or more of the co-plaintiffs has a claim of less than the jurisdictional amount . . . .'" Nevertheless, he claims that *Snyder* does not definitely decide the issue because "the majority did not speak to the point . . . ." C. Wright, *Handbook of the Law of Federal Courts* § 72, at 316 n. 86 (2d ed. 1970), *quoting* 394 U. S. at 343. On this we disagree, for we find the majority's language clear and unambiguous. We therefore think that *Snyder* precludes our obtaining jurisdiction over those members of the proposed class who do not meet the $10,000 jurisdictional requirement.

To be sure, the basis of *Snyder* is a reaffirmation of quite well settled law as applied to the amended Rule 23, whereas it has never been settled by a square holding that every unnamed class member in a spurious class suit must individually satisfy the jurisdictional monetary limitation. Neither *Snyder* nor *Clark* involved named plaintiffs all of whom met the jurisdictional amount. Before the amendment of Rule 23 in 1966 the majority of the case law held that only named plaintiffs (*i.e.*, the original parties and those who intervened under prior Rule 24) were bound by

the result of a spurious class action. *See* C. Wright, *supra*, § 72 at 310. As amended, Rule 23 provides that all members of a class who do not request exclusion are bound by the resulting judgment. Thus only after the 1966 amendment did the issue of whether an unnamed plaintiff was required independently to meet the jurisdictional amount becomes significant. The aggregation issue resolved in *Snyder*, however, was always important as it related to the jurisdictional requirements for named as well as unnamed plaintiffs. Nevertheless, despite this possible distinction, we feel bound by the clear language of the Supreme Court; accordingly we hold that each class member in a spurious class action must independently satisfy the requirement as to jurisdictional amount. Nor do we find room in the Court's language for the admittedly attractive distinction proposed by one commentator in discussing the jurisdictional requirements for intervention under the prior Rule 24: "Should a large number of claimants meet the jurisdictional requirements, a few claimants who do not meet them could be deemed within the ancillary jurisdiction of the court." G. Fraser, *Ancillary Jurisdiction and the Joinder of Claims* in the Federal Courts, 33 F. R. D. 27, 45 (1963) (footnote omitted).

We recognize that our decision today may conflict with that implied by Professor Moore's conclusion that in a Rule 23(b)(3) suit "the several claim or claims of or against each member of the class appearing of record as an *original party* [have] to equal or exceed the specified amount in controversy." 3B Moore's Federal Practice § 23.95 (2d ed. 1969) (emphasis added; footnote omitted). Professor Wright recognizes that there are "indications" that *Snyder*

will be interpreted as we have interpreted it, but argues that "this is not an inevitable conclusion and it would aggravate the damaging effect the Snyder decision had had on the attempt to modernize the law of class actions." C. Wright, *supra*, § 72 at 316. *But see* H. Hart & H. Wechsler, *The Federal Courts and the Federal System* 935-37 (1953).

Our holding is in accord with *Alvarez* v. *Pan American Life Ins. Co.*, 375 F. 2d 992, 996-97 (5th Cir.), *cert. denied*, 389 U. S. 827 (1967), although only one member of the class in *Alvarez* met the jurisdictional amount, and that member was not a named plaintiff, a possible distinction. *Lesch* v. *Chicago & E. I. R. R. Co.*, 279 F. Supp. 908, 912 (N. D. Ill. 1968), is a pre-*Snyder* opinion on all fours with the case at bar and *contra* to our holding. *Steele* v. *Guaranty Trust Co.*, 164 F. 2d 387, 388 (2d Cir. 1947), *Speed* v. *Transamerica Corp.*, 135 F. Supp. 176, 202 (D. Del. 1955), *modified*, 235 F. 2d 369 (3d Cir. 1956), and *Wagner* v. *Kemper*, 13 F. R. D. 128, 130 (W. D. No. 1952), stated that the requisite jurisdictional amount had to be met by intervenors in a spurious class action under prior Rule 24. *Amen* v. *Black*, 234 F. 2d 12 (10th Cir.), *cert. granted to determine jurisdictional question*, 352 U. S. 888 (1956), *remanded because of settlement*, 355 U. S. 600 (1958), and *Shipley* v. *Pittsburgh & L. E. R. Co.*, 70 F. Supp. 870, 876 (1947), are *contra* to *Steele* and *Wagner*. *See generally McGrath* v. *Tadayasu Abo*, 186 F. 2d 766, 770-71 (9th Cir.), *cert denied*, 342 U. S. 832 (1951); *Knowles* v. *War Damage Corp.*, 171 F. 2d 15, 18 (D. C. Cir. 1948), *cert. denied*, 336 U. S. 914 (1949); *Hackner* v. *Guaranty Trust Co.*, 117 F. 2d 95, 97 (2d Cir.), *cert. denied*, 313 U. S. 559 (1941); *Mutation Mink Breeders Ass'n v. Lou Nierenberg Corp.*, 23 F. R. D. 155, 162 (S. D.

N. Y. 1959). There are also a number of relatively recent cases in which courts of appeals, without referring to the point, have assumed either that all class members must meet the jurisdictional amount, or that only one class member must do so. In at least some of these cases it appears that the assumption was made only *arguendo*. *See Lonnquist* v. *J. C. Penney Co.*, 421 F. 2d 597, 599-600 (10th Cir. 1970) (assumes one class member suffices); *Dierks* v. *Thompson*, 414 F. 2d 453, 456 (1st Cir. 1969) (assumes all class members must meet amount); *Potrero Hill Community Action Comm.* v. *Housing Authority*, 410 F. 2d 974, 978 (9th Cir. 1969) (assumes one class member suffices).

We reach our decision today with great reluctance. For if a construction of Rule 23 were controlling, rather than the phrase "amount in controversy" in the jurisdictional statute, our decision would be different. Rule 23 contemplates a suit brought by representatives of an appropriately defined class; members of the class other than the named representatives need never come into court. In fact, the court may not even know the identity of the unnamed plaintiffs: notice of the action may be by publication if individual notice is not feasible. Thus the requirement that each class member meet the jurisdictional amount clearly undermines the usefulness of Rule 23(b)(3) class suits, because the problem of defining an appropriate class over which the court has jurisdiction will often prove insuperable.[1]

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[1] *Cf.* C. Wright, *Handbook of the Law of Federal Courts* § 72, at 316 (2d ed. 1970) (emphasis added; footnote omitted): "There are indication that [*Snyder*] also means that [Rule 23(b)(3)] cannot be used in diversity cases save for the *extraordinary situation* in which every member of the class has a claim in excess of $10,000 . . ."

Indeed, we think this problem is insuperable in the case at bar, for we can find no appropriate class over which we have jurisdiction. A class defined as all lakefront landowners and lessees in the towns of Orwell, Shoreham, and Bridport having $10,000 in controversy would not be feasible. The class would have to be further defined either before or after trial on the liability issue. A determination before trial of the landowners actually encompassed within this class would require the unnamed class members to appear and at least plead, and perhaps prove facts substantiating, an amount in controversy. This would eliminate any advantage of a class action over joinder; a class action would therefore not be properly maintainable because class treatment would not be "superior to other available methods for the fair and efficient adjudication of the controversy," as required by Rule 23(b)(3). Nor could further definition of the class be postponed until after the trial on the liability issue. As the notes of the advisory committee indicate, the 1966 revision of Rule 23 was meant to exclude "one-way intervention" and to lessen problems relating to the *res judicata* effect of judgments. But if liability were found not to exist in the case at bar, the *res judicata* effect of the judgment would depend on an evaluation at some future date of whether a given class member had $10,000 in controversy at the time of this action. This is clearly an impossible task. And if liability were found to exist, the question of jurisdiction would be hopelessly interwined with the determination of damages, despite the fact that the "inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith as oust the jurisdiction." *St. Paul Mercury Indemnity Co.* v. *Red Cab Co., supra*, 303 U. S. at 289 (footnote omitted).

Accordingly, it is hereby ordered that reference to all persons other than the four named plaintiffs is strictly from the complaint and that this action will not be permitted to proceed as a class action.

AMENDMENT TO OPINION AND ORDER

Peter Langrock, Esq. and Mark Sperry, Esq., Langrock & Sperry, Middlebury, Vermont, for plaintiffs.

Henry Black, Esq., Black & Plante, White River Junction, Vermont, and Taggart Whipple, Esq., Richard Nolan, Esq., and Frank Ferony, Esq., Davis, Polk & Wardwell, New York, New York, for defendants.

LEDDY, *Chief Judge.*

This court's opinion and order of September 30, 1971, are hereby amended by adding at the end thereof the following:

Application for Certification Under 28 U. S. C. §1292(b)

Plaintiffs have moved that this court amend its previous order so as to permit appeal under 28 U. S. C. § 1292(b). Although we recognize that appeals under section 1292(b) should be granted only in very limited cases, *Gottesison* v. *General Motors Corp.*, 268 F. 2d 194 (2d Cir. 1970, we believe that the instant case is one to which it is improperly applied.

We assume, without deciding, that our order denying class treatment is interlocutory rather than final in nature. *See generally Caceres* v. *International Air Transport Ass'n*, 422 F. 2d 141 (1970), and cases cited therein. Our order

involves a controlling question of law, *vis.* "whether federal courts have jurisdiction over all members of an allegedly otherwise proper class, in a class suit in which the claims of the class members are separate and distinct, if some members of the class individually meet the jurisdictional requirements as to the amount in controversy and others, who are not named representatives, do not." Page 3 of original opinion. That there is a substantial ground for difference of opinion as to this question is clear from the authority cited in our opinion which is *contra* to our holding, although we find this authority unconvincing. Defendants contend, however, that the required "controlling question of law" must relate to the merits of the action for an order to be appeable under section 1292(b). Whether or not orders striking class action allegations can be so characterized, such orders certainly do not "only relate to pretrial procedures" as did the order in *Switzerland Cheese Ass'n, Inc.* v. *E. Horne's Market, Inc.*, 385 U. S. 23 (1966). In that case the Supreme Court held that an order denying summary judgment on the basis of the existence of a triable issue of fact was not appealable under 28 U. S.C. § 1292(a)(1), which provides for appeals as of right from interlocutory orders affecting injunctions. The Second Circuit, moreover, has indicated that it considers class action orders appealable under section 1292(b) in a proper case. In *Caceres* v. *International Air Transport Ass'n, supra*, 422 F. 2d at 144, the Second Circuit held that not every class action order is appealable as of right under 28 U. S. C. § 1291. If every such order were appealable as of right, the court reasoned, discretionary appeal under section 1292(b) would be unnecessary, whereas the latter procedure was considered a proper and preferable approach.

Finally, we also think that an immediate appeal on the propriety of class treatment may materially advance the ultimate termination of the litigation. This case involves a particularly complicated issue of liability and is likely to involve protracted and costly litigation. If our opinion as to the jurisdictional requirements for Rule 23(b)(3) class suits is erroneous, reversal after trial on the merits may require a new trial, and failure of the named plaintiffs to prosecute an appeal on our ruling may result in a multiplicity of protracted suits by other members of the proposed class.[1]

Accordingly, plantiffs' motion is granted.

This amendment shall be an addition to and an integral part of the opinion and order in the above case dated and filed on September 30, 1971.

Done at Burlington in the District of Vermont, this 21st day of October, 1971.

BERNARD J. LEDDY,
Chief Judge.

Endorsed: Filed October 21, 1971.
Edward J. Trudell,
Clerk.

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[1] *See Comment, Interlocutory Appeals from Orders Striking Class Action Allegations,* 70 Colum. L. Rev. 1292, 1293-94 (1970) (footnote omitted)

> Even if the named plaintiff . . . succeeds on the merits in his individual capacity, he may then abandon his original goal of reducing his own expenses by representing a class rather than pay the costs of an appeal that might possibly fail to win a reversal of the order. The remainder of the class wou'd consequently be left without a representative or "champion." On the other hand, if the named plaintiff does appeal the order after prevailing on the merits, his success on appeal may be a dubious blessing from his point of view; he may be permitted to represent the class but be required to prosecute a new trial. [The commentator then states the reasons why a new trial may be required.]